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No. 20620

In the  
United States Court of Appeals  
For the Ninth Circuit

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HARLOW H. OBERBILLIG, as administrator  
of the Estate of J. J. Oberbillig,

*Appellant,*

*vs.*

BRADLEY MINING COMPANY,

*Appellees.*

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**BRIEF OF APPELLANT**

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*On Appeal from the District Court of the  
United States for the District of Idaho,  
Southern Division*

FILED

MAR 16 1966

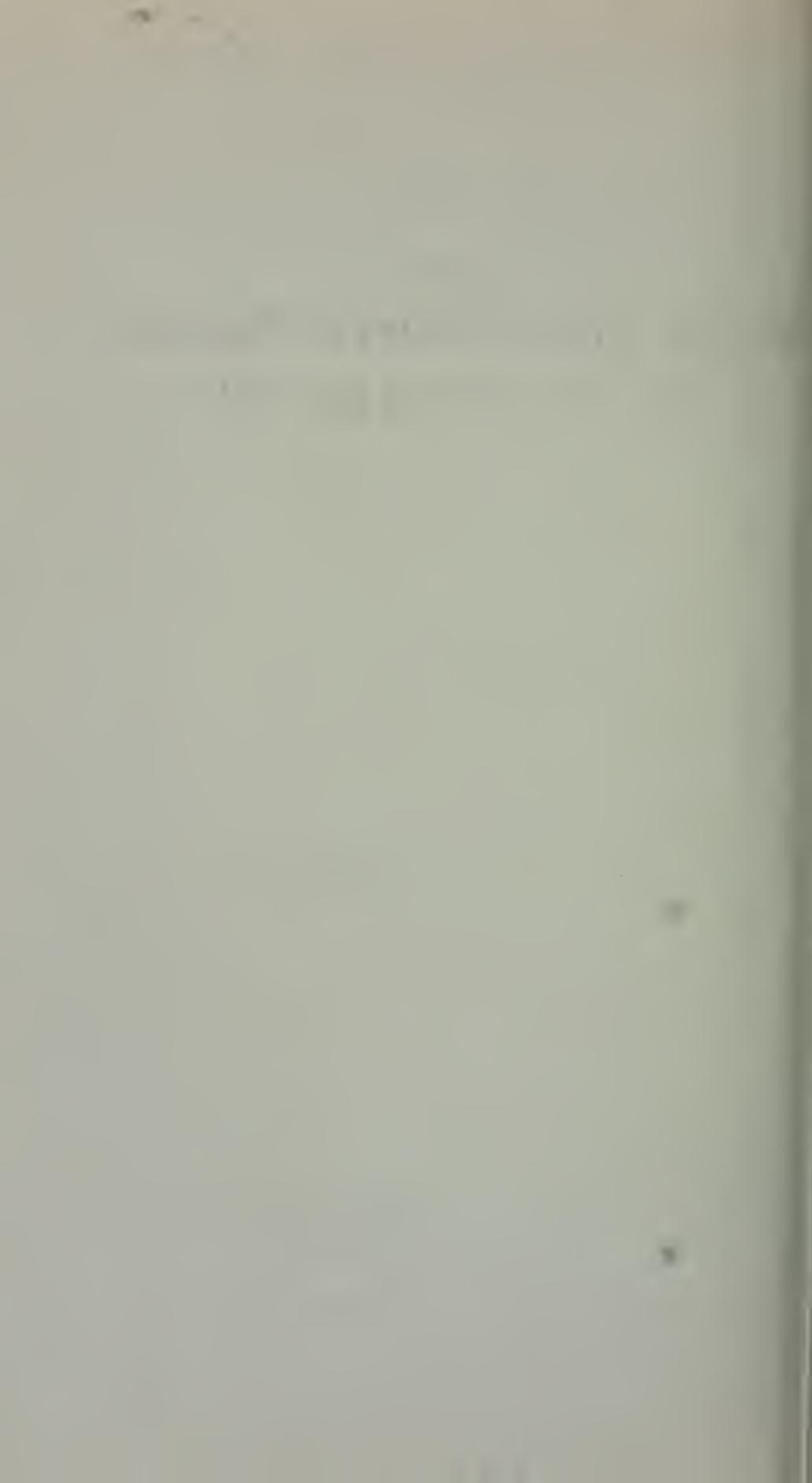
CLEMONS, SKILES & GREEN

*Counsel for Appellant*

Res: Boise, Idaho

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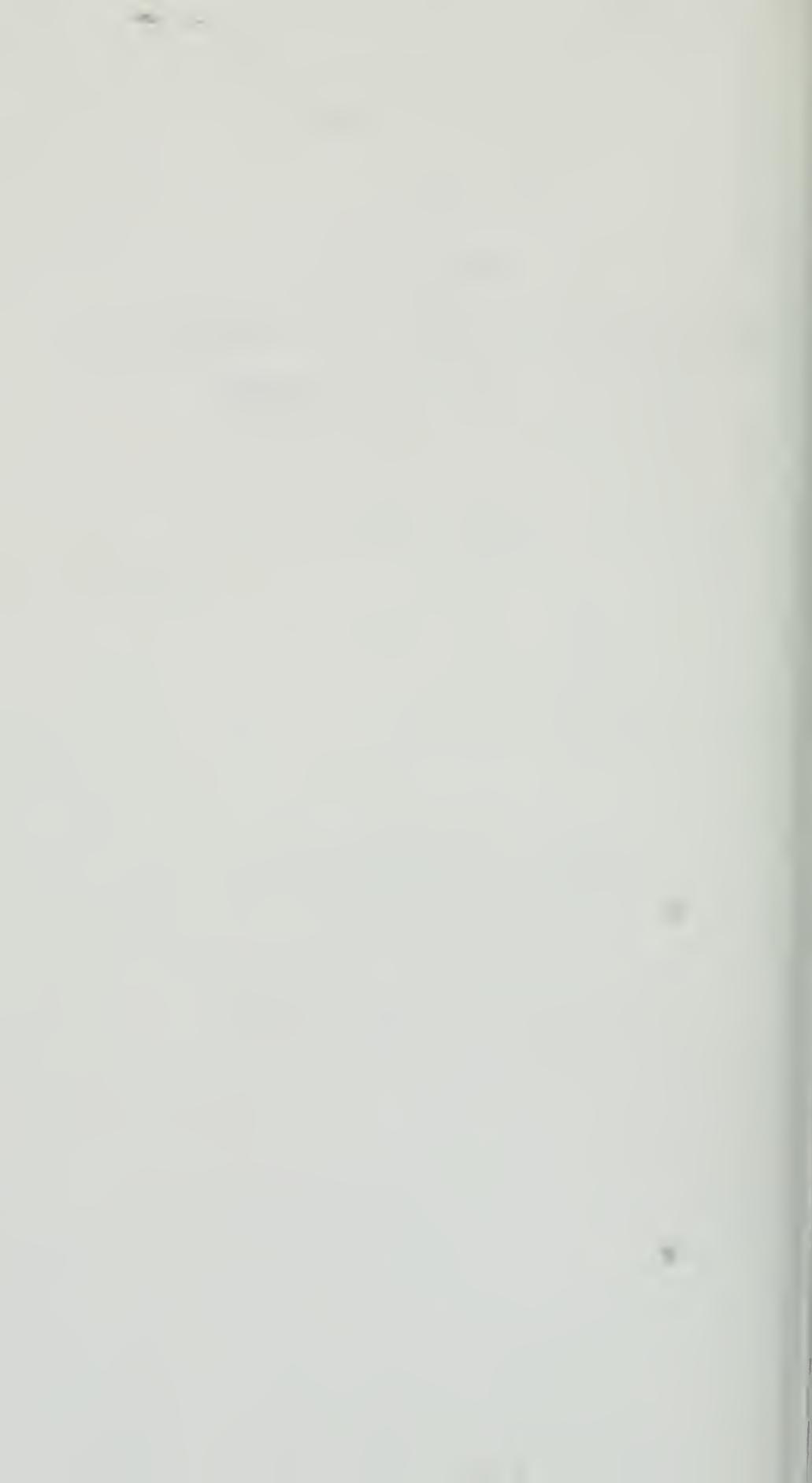
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**BRIEF OF APPELLANT**

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**JURISDICTIONAL STATEMENT**

The District Court had jurisdiction under 28 U.S.C.A. 1332, diversity of citizenship, plaintiff being a resident and citizen of Idaho (T.R. 35-36 and 50), defendant being a California corporation (T.R. 36 and 50), and the amount in controversy, exclusive of interest and costs, exceeding \$10,000.00 (T.R. 6 and 50).

This court has jurisdiction to hear the appeal under 28 U.S.C.A. 1291 and 2107 and Federal Rules of Civil Procedure, Rule No. 73.

## STATEMENT OF THE CASE

Under date of December 31, 1941, appellant's predecessor and the appellee entered into a contract entitled "Conveyance, Royalty Agreement and Option" (T.R. 8-23), under the terms of which it was agreed (T.R. 8) that "in consideration of the royalty herein-after agreed to be paid by Bradley" the appellant did "grant, bargain, sell and assign, unto Bradley" (appellee) certain lode and placer mining claims situate in the Yellow Pine Mining District, Valley County, Idaho, together with certain easements of tailing ponds (T.R. 12) and water rights-of-way (T.R. 12-13), mill-sites, warehouses, etc.

The provisions of said agreement will be more specifically referred to under the argument in this brief.

Appellee entered upon the mining properties and explored and mined the same from 1941 until July, 1952 (T.R. 38) extracting therefrom gold, silver, antimony and tungsten metals (T.R. 41). The mining claims in question have a proven mineral deposit, there having been concentrate shipments of minerals from the Yellow Pine Mine at Stibnite from 1932 (this date preceding the date of the contract between the parties to this action) to 1952, 9.5 million in gold value, 1.1 million in silver value, 9.6 million in antimony value and 17.8 million in tungsten value, produced from 4.7 million tons of ore (T.R. 41-42).

After July 26, 1952, the appellee discontinued mining and development operations upon the property (T.R. 38), although there was, and still are large quantities of ore of commercial value blocked out for milling and mining purposes (T.R. 38).

Appellee also operated a mine known as Ima Tung-

sten Mine which was located in eastern Idaho (T.R. 42), which mine was not a part of the properties conveyed by appellant. After the stoppage of development and mining operations in the Yellow Pine area, many of the Yellow Pine facilities were used in support of the Ima Mine operation (T.R. 42).

After July 1952, appellee began to dismantle and remove facilities previously used in mining operation. In 1957 a general auction was held and thereafter over a period of several years all facilities such as dwelling houses, warehouses and smelter facilities were gradually removed (T.R. 43) over a period of several years the last of the production and housing facilities being removed in 1964 (T.R. 44).

In 1955 appellee reconveyed to appellant 211 unpatented claims in the Antimony Ridge Group. In 1957, appellee reconveyed to appellant 217 unpatented claims in the Midnight Group (T.R. 43). In 1960, appellee reconveyed 19 unpatented claims, and in 1963 reconveyed 18 unpatented claims to appellant (T.R. 43-44). At this point all claims requiring annual assessment work had been reconveyed to appellant, while appellee retained 26 patented claims originally set forth in the 1941 agreement and 4 or 5 claims patented subsequent to the 1941 agreement (T.R. 43). Within the exterior boundaries of the patented claims retained by appellee was included the Meadow Creek Mine, Hennessy pit mine, the mill, smelter, all warehouses and dwelling houses, airport landing strip and hangar (T.R. 43). By its reconveyances the appellant divested itself of all lands requiring expensive annual assessment work and retained approximately 600 acres of patented lands taxable at approximately \$200.00 per year (T.R. 44). In addition, appellant allowed certain water rights to terminate (T.R. 44).

The area retained by appellee amounts to or constitutes the heartland of the mining properties originally described in, and conveyed by, the 1941 agreement (T.R. 44).

This action was filed January 7, 1965, whereby appellant seeks judgment for damages in the amount of \$107,485.50 and for reconveyance of the patented claims to appellant which are still held by appellee (T.R. 6 and 39). Appellee filed a motion to dismiss, which was treated and heard as a motion for summary judgment (T.R. 46) upon the amended complaint (T.R. 35-40) and the affidavits of Eugene C. Thomas (T.R. 26-27) and Harlow H. Oberbillig (T.R. 41-44). The court entered its memorandum decision (T.R. 46-48) granting the summary judgment and entered findings, conclusions (T.R. 49-54) and judgment (T.R. 55-56) thereon.

#### SPECIFICATIONS OF ERROR

Appellant claims the court erred:

1. In allowing and granting appellee's motion to dismiss.
2. In allowing and granting appellee's motion to dismiss and granting a summary judgment.
3. In making and entering its Findings of Fact No. VIII, holding that appellee was not, and is not, required to continue to mine, mill and produce metals, ores, minerals and values from the premises conveyed under the agreement of December 31, 1941, and holding that the appellee has the discretion as to the time, amount, extent and manner of mining, milling and producing minerals, ores and metals and the right to terminate the operations and not to resume the same.

4. In making and entering its conclusions of law No. III that the agreement of December 31, 1941, does not require Bradley Mining Company to mine, mill and produce metals, ores, minerals or values from the premises and that the appellee has the discretion to terminate the mining operations and not to resume the same.
5. In making and entering its conclusions of law No. IV holding that any claims of the appellant against Bradley Mining Company under said agreement of December 31, 1941, are barred by the five-year statute of limitations under Idaho Code, Sec. 5-216.
6. In making and entering its conclusions of law No. V holding that the appellant's Amended Complaint fails to state a claim upon which relief can be granted against appellee because of the failure of the appellee to mine, mill and produce minerals, ores, metals or values from the premises.
7. In failing to hold and find that appellee was obligated under the facts set forth in the Amended Complaint to mine and/or mill and/or produce metals or ores on the conveyed premises.
8. In failing to find and hold that the Amended Complaint of the appellant states a claim against the appellee for its failure to mine, mill or produce metals or ores from the premises under the conditions set forth in appellant's complaint.
9. In failing to find that the appellee is obligated to reconvey the premises to the appellant.
10. In making and entering its Amended Judgment on October 20, 1965, dismissing appellant's complaint with prejudice and holding that the appellant take nothing by the action.

## SUMMARY AND STATEMENT OF QUESTIONS PRESENTED

1. Does the agreement of December 31, 1941, constitute:
  - (a) a deed, or
  - (b) a lease.
2. If a deed, where the only consideration to the grantor is the payment of royalties, is there an implied obligation and covenant to reasonably explore and develop the mining properties?
3. If a lease, where the only consideration is the payment of royalties, is there an implied obligation and covenant to reasonably explore and develop the mining properties?
4. Does appellee's failure to explore, develop and mine the property constitute an abandonment and forfeiture of all right, title and interest to the mining claims?
5. Does Section 5-216, Idaho Code, which provides that an action upon a written contract must be commenced within 5 years, apply?

## ARGUMENT AND AUTHORITIES

### I

#### *Provisions of the Contract*

The contract of December 31, 1941, between United (the grantor and appellant here) and Bradley (the grantee and appellee here), provides in part (T.R. 8) (emphasis supplied) :

“That the said UNITED for and in consideration of the royalty hereinafter agreed to be paid by BRADLEY, its successors and assigns, to UNITED,

its successors and assigns, and in consideration of the mutual covenant and agreements herein contained *and subject to the royalty herinafter reserved and retained, and the mortgage herein created to secure the payment of said royalty,* has Granted, Bargained, Sold, and Assigned, and does by these presents grant, bargain, sell and assign \* \* \* all the following described lode and placer claims \* \* \*

And (T.R. 13), (at the bottom of the page) :

“ \* \* \* To Have and To Hold, subject to the royalty herein reserved and retained by UNITED \* \* \* ”

And (T.R. 14) :

“For and in consideration of the premises and the conveyance and assignment of the above described properties, BRADLEY \* \* \* does hereby covenant, promise and agree to pay to UNITED \* \* \* a royalty of five percent (5%) on all net smelter returns \* \* \* upon and for all minerals, ores, metals or values, of every kind and character, mined, extracted or taken from the above described mining claims, or any part thereof \* \* \* ”

And (T.R. 16) :

“The above covenants on the part of BRADLEY to pay the royalty herein agreed to be paid shall be considered and held to be covenants running with the lands, grounds, minerals, ores, values, and mining claims hereby conveyed to BRADLEY and shall be binding upon BRADLEY, its successors and assigns, forever.

“It is agreed that the time, amount, extent and manner of conducting mining operations and development work upon or in the above-described mining claims shall be in the sole discretion of BRAD-

LEY, its successors, and assigns, and that the failure of BRADLEY to mine shall not be held to be a condition subsequent defeating the conveyance made hereby."

It is then provided that ownership of the properties shall be in Bradley, except (T.R. 16) :

"\* \* \* EXCEPT that in the event BRADLEY, its successors and assigns, fails or refuses to pay any royalties herein reserved when the same shall become due that the *said UNITED shall have a mortgage lien, in, to, and upon all of the above and foregoing described properties to secure the payment of said sums* and BRADLEY does hereby mortgage the above and foregoing described properties, and any interest it may hereafter acquire in the Midnight Group hereinafter described, and the whole thereof, to secure the payment of said royalty."

And as to the Midnight Group of claims (T.R. 17) :

"For and in consideration of the premises, and the covenant of BRADLEY to pay the royalty hereinbefore provided for, UNITED hereby gives and grants unto the said BRADLEY an option to acquire \* \* \*"

Then it is agreed (T.R. 20) that if Bradley does exercise its option and acquire the Midnight Group the royalty shall be increased to 5½ per cent upon all ores, metals or values extracted.

There appears no other payments or considerations from appellee to appellant the payment of royalties as above set forth being the only consideration, except the performance by appellee of annual assessment work upon the claims within the Midnight Group (T.R. 18-19), and this can hardly be said to be consideration flowing to appellant.

That it was intended that mining operations continue may be ascertained from the provision (T.R. 14-15) that:

"It is agreed that BRADLEY shall furnish UNITED all necessary information that UNITED may require to assure it that it is receiving the royalty to which it is entitled hereunder, and that UNITED shall have the right to inspect, examine and make copies of the books and records of BRADLEY and supporting data at least every six (6) months so as to enable UNITED to satisfy itself that it is receiving its proper royalties."

## II

### IMPLIED OBLIGATIONS OF A DEED

The decision of the District Court is that under the contract appellee had the sole discretion of how, when or why it would or should explore, develop and mine the properties. The decision is that appellee has no obligation to mine the property, but if this be correct then there was a total lack of consideration for the agreement, because there was no consideration except the payment of royalties, the amount of which cannot be determined and does not exist until the transferee mines the property. In other words, the decision is to say that appellant gave away the property. However, the circumstances surrounding the transaction, the fact that the property was already being mined at the time of the agreement, the fact that royalty payments were being made, and that the sole and only consideration of the contract of December 31, 1941, was the payment of royalties, negates the proposition that appellant intended to make a gift, but on the other hand gives rise to the conclusion that it was the intent of all parties that the property be mined.

In the case of *Downing v. Rademacher* (Cal) 65 Pac. 385, a deed was issued by the grantor to the grantee and an agreement entered into between the parties whereby the grantor was to receive one-third of all minerals mined. The case is quite similar to the case at bar. Commencing at page 386 the court reasoned (emphasis supplied) :

“Here the consideration of the deed is not simply the agreement to perform service. The purchaser was given exclusive possession of the mine and as payment for his interest agreed that he would render to the vendor one-third of the gross proceeds obtained by working the mine. It is like a conveyance made of the farm for one third of the crops which thereafter should be produced. Suppose such a contract could be made, it would amount to a lease and would imply that the grantee, or his assignees, should farm the land, and no doubt, if they should refuse to perform, the land could be recovered. This conveyance was for a share in the proceeds of the mine, and is in every way analogous to the case supposed. *The technical ideas in regard to leasehold estates do not attach to this, but the equities are the same, and so are the implied obligations to work the mine, that the consideration agreed upon may be paid.*”

Further:

“He did not intend to give his property to Downing without consideration, nor did Downing intend to get it for nothing.”

It is interesting to note in the *Downing v. Rademacher* case, supra, the wording in the conveyance was very much like that expressed in the agreement in the case at bar. For the purpose of working the mine, the parties agreed as follows:

“Said party of the first part shall have the exclusive right to work in the mine on said mining claim and mine thereon in any way he shall see fit.”

The court also stated:

“As between the parties, at all events, there is no such magic in a conveyance of a title and fee, which can be used to do an owner out of his property. Under this contract and deed all Downing acquired was the right to work the mine in his own way on condition that he deliver to Rademacher one-third of the valuable minerals obtained.”

The court in discussing consideration paid by the grantee stated:

“The vendee gets the land at a lower price because of the burden, and so do his grantees. They are *continually* paying for the land.” (emphasis added)

The *Downing v. Rademacher* case later came before the Supreme Court and was reaffirmed in 138 Cal. 324, 71 P. 343.

The case of *Sledge v. Stoltz*, 41 Cal. App. 209, 182 P. 340, involved a contract and a deed. The case is in point here in that the court held that both instruments must be construed together and to give legal effect to the deed, according to the intention of the parties, it is subject to the condition and obligation that the grantee mine the property in order that the consideration agreed upon can be paid. The court quoted from *Downing v. Rademacher*, and then said:

“It was held that the sole consideration of the conveyance being for a share of the proceeds of the mine, the equities of the grantor are the same as if a conditional leasehold estate had been granted; that there is an implied obligation to work the mine, in

order that the consideration agreed upon may be paid, and as the share of the grantor cannot be determined until the mine is worked out, the grant of the mine is conditional for the protection of the grantor. Among other cases cited in the opinion is *Richter v. Richter*, 111 Ind. 456, 12 N.E. 698, mentioned as 'directly in point'. Explaining this case Judge Temple said (emphasis supplied) :

"\* \* \* True, neither the deed nor the mortgage state in express terms that the estate is granted upon condition, but the word 'condition' is not necessary to an estate upon condition, if it plainly appears from the words used that the intent of the parties was to create an estate of that description.

\* \* \* In the construction of deeds, as in construing other writings, courts seek to ascertain and give effect to the real intention of the parties, as such intention may be gathered from the language of the whole instrument. The intent is what the law applied itself to deeds. \* \* \* *If from the nature of the acts to be performed by the grantee, and the time required for their performance, it is evidently the intention of the parties that the estate shall be held and enjoyed on condition that the grantee perform the acts specified, then the estate is on condition.* This is especially so when the grantor has reserved no other effectual remedy for the performance on the part of the grantee.' "

There would be no object to transferring approximately 500 mining claims to appellee in this case unless it was for the purpose of, and with the intention of, the exploration and mining of said claims.

## III.

DOES THE INSTRUMENT CONSTITUTE  
A LEASE?

In the case before the court, there was no consideration for the "conveyance" of the mineral claims and mineral rights except the payment of royalties. Was the instrument then a conveyance or was it a lease to continue so long as the grounds were worked and royalties paid?

In *Kentucky Rock Asphalt Co. v. Milliner*, 234 Ky. 217, 27 S.W. 2d 937, the instrument provided in part:

"\* \* \* the party of the first part, in consideration of the sum of Five Dollars, cash in hand paid, and of the agreement of the record party to pay the royalty hereinafter referred to, hereby grants and conveys to the said second party, all of his right, title and interest, in and to all deposits of \* \* \*"

The instrument also gave second party the right of ingress and egress to explore for oils, etc., and to occupy such land as he "may deem reasonably necessary" to so explore, and that if second party found such minerals and removed them then second party should pay a percentage of the profits. This instrument was held to be in fact a lease, rather than a conveyance, requiring development within a reasonable time, although no facts appear in the decision as to any agreement requiring development other than the provision contained in the instrument granting the second party the right of access to reasonably explore the land for such minerals, *it being further held that the second party abandoned all rights under the instrument by failure to develop the land within a reasonable time*, the court saying, after quoting extensively from *Eastern Kentucky Min-*

*eral & Timber Co. v. Swann-Day Lumber Co.*, 146 S.W. 438 (emphasis supplied) :

“Clearly the principles above announced apply with equal force to the case under consideration. The oil, bitumen, and other products in 82½ acres of land were involved. The cash consideration of \$5, being at the rate of only six cents an acre was merely nominal. The real consideration was the development of the property and the payment of royalties, considering the instrument in the light of its provisions, and the situation of the parties, it is clear that it was never intended that the grantee should hold the property forever without paying anything for the privilege. *In the circumstances there is no escape from the conclusion that the instrument, regardless of the name it was called, was intended as a lease, and was executed on the condition that the property would be developed within a reasonable time.* Development having been delayed for more than 30 years, *it follows that appellants have abandoned their rights under the instrument and no longer have any interest in the property.*”

Although in the case of *Bardhill v. Sellers*, (Ky) 298 S.W. 2d 5, the instrument expressed an obligation on the grantee to develop the property within a set period, which was held as not particularly controlling in later Texas cases, herein afterward cited, *The court held the instrument to constitute a lease rather than a deed*, saying :

“We construe the opinions in *Eastern Kentucky Mineral & Timber Co.*, 148 Ky. 82, 146 S.W. 438, 46 L.R.A., N.S., 672, and *Kentucky Rock Asphalt Co. v. Milliner*, 234 Ky. 217, 27 S.W. 2d 937, as standing for the proposition that in the case of a conveyance

of mineral rights, an implied condition of reasonable development will be read into the conveyance, unless there is an immediate valuable consideration paid to the grantor, as distinguished from a consideration dependant solely upon the election of the grantee as to future activity. As said in the Swann-Day case, 146 S.W. at page 441: 'we don't think any court should give to a contract like this such a construction as should place it in the power of the grantee, without any loss, outlay or disadvantage, to take, keep and hold indefinitely valuable property rights in the manner attempted in this case.' "

Following the Bardhill v. Sellers case, the Court of Appeals in *Clark v. Wilson*, (Ky.) 316 S.W. 2d 693, held (emphasis supplied) :

"In the Bardhill case we construed the instrument \* \* \* to be a 'lease' rather than a 'deed.' The parties to the Adams instrument did not express an obligation on the part of the grantee or lessee to develop the property within a set period as did the Rideout instrument. *But that provision was not regarded as of vital importance, the decision of the Bardhill case being upon the ground that in such a conveyance of minerals and right an implied duty and condition is annexed to the grant that there will be reasonable development* 'unless there is an immediate valuable consideration paid to the grantor, as distinguished from a consideration dependent solely upon the election of the grantee as to future activity.' *Like the instrument in the Bardhill case, the present one was for a consideration which did not have and never would have had any value 'except when and if the company chose to engage in development of its "leases".'* The decision is not only supported by our

two former cases cited therein, but by other authority as well. See (citing authority), and annotation \* \* \*. 137 A.L.R. 415.

*"In \* \* \* (citing authority) we regarded the real inducement and the consideration for each conveyance (in form absolute) as being the exploration and development of the property and the royalty or percentage of the production. We, therefore, held the omission of a stipulation as to when development operations shall begin or of a reservation of the right of reentry because of inactivity will not prevent the enforcement of the implied condition that development shall be begun within a reasonable time. We observed in the Eastern Kentucky and Mineral Co. case that this was not a novel method of interpretation, saying (148 Ky 82, 146 S.W. 442) :*

*'The books are full of cases in which the courts, to prevent gross injustice, have gathered from the contract and the circumstances surrounding its execution the intention of the parties and construed it to carry out their purpose, although in so doing it was found necessary to supply omissions.'*

*"We construe the old Adams instrument as being the same as a gas and oil lease. This is necessary to effectuate the actual intention of the parties as reflected by the instrument as a whole in the light of circumstances under which it was made and the purposes sought to be accomplished. (citing authority). Abandonment and breach of the condition to develop the property forfeited the rights which passed under the Adams lease to the Sand Lick Oil and Gas Company. Justice v. Burgess, 244 Ky. 774, 52 S.W. 2d 720."*

The Bardhill case is also cited by *Majors v. Easley* (Ky) 328 S.W. 2d 834 as follows (emphasis supplied) :

“\* \* \* A similar instrument conveying those inorganic substances to the Owensboro Hawesville Gas and Mineral Company has been held to have been a lease which imparted a condition of reasonable development, and that in the absence of such development, the rights granted by the instrument had been abandoned and forfeited. *Bardhill v. Sellers*, Ky., 298 S.W. 2d 5. \* \* \*”

In *Payne v. Neuval*, 99 P. 476, at page 478 of the Pacific Report, citing from *Acme Oil & Mining Co. v. Williams*, the court said (emphasis supplied) :

“\* \* \* ‘These leases are only valuable on development, and are then only valuable to both parties to the extent that the product may be secured and disposed of; and, when the only consideration for the lease is the share which the lessor will obtain of what is provided, there is always an implied covenant that diligence will be used toward production. \* \* \*’

There are a multitude of cases where leases are involved that state that in royalty cases where no other consideration is involved there is an implied covenant by the lessee to mine in a diligent manner, including *Mountain States Oil Corporation v. Sandoval*, 109 Colo. 401, 125 P. 2d 964 and *Rocky Mountain Fuel Company v. Clayton Coal Company*, 110 Colo. 334, 134 P.2d 1062, at 1067 where it is also held that failure to do so is an abandonment and forfeiture of the lease.

*Danciger Oil & Refining Co. of Texas v. Powell*, 137 Tex. 484, 154 S.W. 2d 632, is interesting and in point in this: The court recognizes that an implied covenant to develop may be read into an instrument of convey-

ance to give effect to the intention of the parties as gathered from the instrument. However, in this case there was a cash consideration of \$50,000.00, with future consideration to be paid in royalties, but to be paid in monthly installments irregardless of the income of the grantee, the court by reason of the cash payment held this particular contract to constitute a conveyance and not a lease, but reasoned (emphasis supplied) :

“\* \* \* It is not enough to say that an implied covenant is necessary to make the contract fair, or that without such a covenant it would be improvident or unwise, or that the contract would operate unjustly. *It must arise from the presumed intention of the parties as gathered from the instrument as a whole.* (citing authority) However, covenants will be implied in fact when necessary to give effect to the actual intentions of the parties as reflected by the contract or conveyance in its entirety in the light of the circumstances under which it was made and the purposes sought to be accomplished thereby. \* \* \*”

“ There are numerous authorities in Texas which recognize the doctrine of an implied covenant in the usual gas and oil mining lease for the reasonable development of the property after the discovery of gas or oil in paying quantities. (citing authority). “In recognition of the distinction between a lease and a conveyance of the minerals, some authorities seem to hold that if the instrument is a lease there is an implied covenant for reasonable development after discovery of oil, but if the instrument is a conveyance of the minerals there is no such implied covenant. \* \* \*

“*However, we are of the opinion that there can be such an implied covenant to develop property even*

though the instrument be a conveyance of the minerals and not a lease. This court so held in the *Freeport Sulphur Company v. American Sulphur Royalty Company* case, *supra*. It must be recognized, however, that there is a much stronger reason for favoring an implied covenant under an ordinary \* \* \* lease than there is in a conveyance of the minerals \* \* \*. But the most essential difference is the fact that the predominating purpose of a lease is to secure the exploitation and development of the property for the purposes set out in the lease. *Often the consideration paid to the lessor as a down payment is very small, and it is evident that the main purpose in granting the lease is the lessor's desire to have his land promptly explored, and thoroughly and diligently developed*, with the hopes of receiving more handsome returns in royalties. (citing authority). On the other hand, conveyances of minerals are frequently actuated by a motive of investment on the part of the grantee, and the cash consideration or other down payment is the moving cause for the conveyance by the grantor.

The decision of the District Court is to the effect that appellee has the *arbitrary* discretion to discontinue all operations, at any time it deems fit, for as long as it deems fit. This construction destroys all consideration for the agreement, and negates all purposes for entering into the agreement, and states in effect that the contract relating to mineral properties was never entered into for mining purposes.

On the other hand, the consideration for the lease was the payment of royalties. There was no reason for the agreement on the part of either party except for the purpose of mining operations. The instrument

(lease or deed) related to mining property only. As said in the *Swann-Day Lumber* case, *supra* "it is clear that it was never intended that the grantees should hold the property forever without paying anything for the privilege. In the circumstances there is no escape from the conclusion that the instrument, regardless of the name it was called, was intended as a lease."

True, the "lease" was for a period of "(999) years" and *as long thereafter as minerals*, ores or values shall be extracted: (T.R. 14), but we see no difference between 59, 99 or 999 years as far as the nature of the instrument is concerned.

#### IV.

#### ABANDONMENT

The *Kentucky Rock Asphalt Co. v. Milliner*, *supra*, *Eastern Kentucky Mineral & Timber Co. v. Swann-Day Lumber Co.*, *supra*, *Clark v. Wilson*, *supra*, and *Majors v. Easley*, *supra*, are all authority that upon failure of the grantee to perform the implied obligations to explore and mine there is an abandonment and a forfeiture. In the instant case it should be decreed that appellee has no right, title or interest to the mining claims still held by appellee.

#### V.

#### STATUTE OF LIMITATIONS

The statute of limitations does not begin to run until a complete cause or right of action accrues.

54 C.J.S. Lim. of Actions, Sec. 108

A right of action does not accrue until there is a right to maintain a suit capable of present enforcement. The time test is to determine when a person could

have first maintained an action to a successful result, regardless of when the actual damage results.

#### 54 C.J.S. Lim. of Actions, Sec. 109

Where a party's right depends upon the happening of a future event, the cause of action accrues, and the statute of limitations begins to run, only at the time the event happens.

"whether the contingency affects the right or merely the amount of recovery, the rule is the same; if plaintiff is entitled to recover a greater or smaller amount, dependent upon a certain contingency which may or may not happen, the statute runs against him only after the amount to which he is entitled becomes certain."

#### 54 C.J.S. Lim. of Actions, Sec. 110

In the case of a continuing contract, the person affected at his option may elect the time at which he decides to no longer rely upon performance by the promisor.

#### 54 C.J.S. Lim. of Actions, Sec. 151

*Union Sugar Co. v. Hollister Estate Co.* 47 P. 2d 273, 3 Cal. 2d 740

And even in those jurisdictions where it is held that the statute runs, still where it is a continuing covenant running from day to day, the fact that part of the claim is barred will not prevent action for that part of the claim which is not barred.

#### 54 C.J.S. Lim. of Actions, Sec. 151

*Indian Territory Illuminating Oil Co. v. Rosamond* 120 P. 2d 349, 190 Okl. 46, 138 A.L.R. 246, which was a case of a gas and oil lease, and was a case for re-

covery of damages for failure to drill protective drainage wells, the court said:

“\* \* \* that the lessee will protect the land from drainage by adjoining wells so long as the drilling of a protective well or wells will, in the judgment of a reasonably prudent operator, be a profitable undertaking, is a continuing covenant, the obligation resting upon the lessee during the existence of the lease, or as long as his ownership thereof continues. Plaintiff was not required to treat defendant's failure to drill the well in 1929 as a complete breach of the lease, and bring an action for the cancellation and forfeiture thereof. Obviously he could not then bring his action for damages which he might suffer during the future life of the lease, for such damages would be contingent, speculative, and wholly incapable of ascertainment. See 37 C.J. 852; 34 Am. Jur. 111. The implied covenant being a continuing covenant, the right to maintain an action for its breach continues so long as the breach continues and plaintiff is damaged thereby.

\* \* \*

“The reason for the rule is that while the repeated and successive breaches of the implied covenant continue, the right of action for subsequent breaches does not accrue upon the first breach, but accrues and the statute begins to run as and when each breach occurs. Like an account not mutual in nature, but all on one side, the cause of action arises on the date of each item or breach, and the items within the statutory period of limitations do not draw after them those of longer standing. (citing authority)”

Appellee's breach is a continuing breach which is continuing yet today. Moreover, the removal of facilities

continued up to 1964. (T.R. 44), which brings into question the actual date of the breach.

### CONCLUSION

We respectfully submit the agreement involved in this case constitutes a lease of mineral lands, but whether it be a lease or a deed the legal effect of the instrument is that it carries with it the duty and obligation to explore, develop and mine the properties therein described. Whether it be a lease or a deed, it is a continuing obligation, from day to day, from week to week, from year to year, and a failure of such obligation is a forfeiture of right of title and possession and also gives rise to a cause of action for any and all damages sustained.

### CERTIFICATE

We certify that in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

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